No. 07-1284

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BARRY BIALEK,

Plaintiff-Appellant,

v.

UNITED STATES ACTING ATTORNEY GENERAL PETER D. KEISLER,
FEDERAL ELECTION COMMISSION CHAIRMAN IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado,
the Honorable Wiley Y. Daniel

BRIEF FOR THE FEDERAL ELECTION COMMISSION CHAIRMAN IN HIS OFFICIAL CAPACITY

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September 28, 2007

Oral Argument Not Requested

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There are no prior or related appeals in this matter.

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, ("Act" or "FECA") contains a clear and unambiguous requirement that the United States Department of Justice ("DOJ") must await a referral from the Commission before beginning criminal FECA investigations.

COUNTERSTATEMENT OF THE CASE

This is an appeal by the plaintiff, Barry Bialek, from a June 28, 2007 order of the United States District Court for the District of Colorado (Wiley, J.) dismissing with prejudice his complaint, which sought a declaratory judgment that the Attorney General is barred from conducting an investigation or prosecution of alleged violations of the FECA until the FEC has investigated and referred the matter to DOJ. JA 9.[1] The court held that the Act does not restrict in any way the Attorney General's authority to investigate and prosecute criminal violations of the Act and granted the defendants' motions to dismiss. JA 268.[2]

COUNTERSTATEMENT OF THE FACTS

A. THE FEDERAL ELECTION COMMISSION AND JURISDICTION OVER CIVIL ENFORCEMENT OF THE ACT

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes — the FECA, the Presidential Election Campaign Fund Act, 26 U.S.C.

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[1] "JA__" references are to the consecutively numbered pages of the Joint Appendix filed with the Appellant's brief.

[2] Pursuant to Federal Rule of Appellate Procedure 43(c)(1) and (2), public officers may be described by official title rather than by name and a public officer's successor is automatically substituted as a party. Here, defendant Michael E. Toner resigned from the Commission on March 14, 2007. The Commission's current chairman is therefore automatically substituted as a party

§§ 9001-9013,[3] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.[4] *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g.

The FECA imposes extensive requirements for comprehensive public disclosure of all contributions and expenditures in connection with federal election campaigns. 2 U.S.C. §§ 432-434. The Act places dollar limitations on contributions by individuals and multi-candidate political committees to candidates for federal office, 2 U.S.C. § 441a(a), and prohibits campaign contributions by corporations and unions from their treasury funds. 2 U.S.C. § 441b(a). The Act also prohibits contributions made in the name of another. 2 U.S.C. § 441f. Contributing money to a candidate in one's own name using funds provided by someone else is an example of activity that violates 2 U.S.C. § 441f. 11 C.F.R. § 110.4(b)(2)(i).

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and the Commission has accordingly changed the caption of the case on this brief to describe the defendant chairman simply by official title.

[3] The Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), provides for a voluntary program of public financing of the general election campaigns of eligible major and minor party nominees for the offices of President and Vice President of the United States.

[4] The Presidential Primary Matching Payment Account Act 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"), provides partial federal financing for the campaigns of presidential primary candidates who choose to participate and satisfy certain eligibility requirements.

Pursuant to the Act, the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act and the two presidential public funding statutes. 2 U.S.C. § 437c(b)(1). The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), pursuant to detailed administrative procedures prescribed by Congress in the Act. 2 U.S.C. § 437g(a). The Act provides that the Commission may initiate an administrative enforcement proceeding based upon a complaint that is "in writing, signed and sworn to," made by "any person who believes a violation" of the Act "has occurred," 2 U.S.C. § 437g(a)(1), or upon "the basis of information ascertained in the normal course of carrying out its supervisory duties," 2 U.S.C. § 437g(a)(2). If an administrative complaint is filed, the Commission must notify the respondent and provide him with an opportunity to respond. If the Commission finds reason to believe that there has been a violation of the Act, the Commission may "make an investigation of [the] alleged violation, which may include a field investigation or audit, in accordance with the provisions of [section 437g(a)]." 2 U.S.C. § 437g(a)(2). The Act permits the Commission to issue subpoenas and orders in aid of its investigation and provides it with the power to seek judicial enforcement of such orders in federal district court. 2 U.S.C. §§ 437d(a)(3) and (4); 2 U.S.C. § 437d(b).

At the conclusion of an administrative investigation, the statute authorizes the Commission's General Counsel to recommend that the Commission vote on whether there is probable cause to believe that the Act has been violated. 2 U.S.C. § 437g(a)(3). If she recommends that the Commission find probable cause to believe respondents have violated the Act, the statute requires the General Counsel to notify the respondents, provide them with a brief stating her position on the issues, and give the respondents the opportunity to submit a response brief. *Id.* The General Counsel then prepares a report to the Commission, recommending what action the Commission should take. 11 C.F.R. § 111.16. Upon consideration of the briefs and report, the Commission determines whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(4)(A)(i).

If the Commission finds probable cause to believe a violation that is *not* knowing and willful has occurred, it attempts to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). The Act requires any such conciliation effort to continue for at least 30 days — or 15 days if the probable cause finding was made within 45 days of an election — and authorizes the Commission to continue such negotiations for up to 90 days. *Id*. If the Commission is unable to negotiate an acceptable conciliation agreement, the

Act permits the Commission to file a civil law enforcement suit in federal district court. The Commission's decision whether to file a civil enforcement suit is discretionary, and the litigation in district court is *de novo*. *See* 2 U.S.C. § 437g(a)(6)(A).

If the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred, the statute permits the Commission to engage in conciliation and seek civil penalties for violations that are higher than those the Commission may seek for violations that are non-willful. The amount the Commission may seek for most knowing and willful violations (currently $11,000 or 200% of the contribution or expenditure involved in the transaction) is double the amount it may seek if the violation is non-willful. 2 U.S.C. § 437g(a)(5)(A), (B). Knowing and willful violations of 2 U.S.C. § 441f (contributions in the name of another) can result in penalties of "not less than 300 percent of the amount involved in the violation and . . . not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation." 2 U.S.C. § 437g(a)(5)(B).

After a Commission finding of probable cause to believe that a "knowing and willful" violation has occurred, the statute also permits the Commission to refer such apparent violation to the Attorney General for criminal prosecution, pursuant to 2 U.S.C. § 437g(d), without having to engage in conciliation first:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A) [the conciliation requirement].

2 U.S.C. § 437g(a)(5)(C). When the Commission refers a knowing and willful violation of the Act to the Attorney General, the Act requires the Department of Justice to report periodically to the Commission concerning the matter. 2 U.S.C. § 437g(c). If there is a conciliation agreement with the Commission, it may be introduced by the defendants in a subsequent criminal prosecution for the same "act or failure to act constituting such violation," to "evidence their lack of knowledge or intent to commit the alleged violation," 2 U.S.C. § 437g(d)(2), and as a mitigating factor in sentencing. 2 U.S.C.§ 437g(d)(3).

B. THE DEPARTMENT OF JUSTICE AND JURISDICTION OVER CRIMINAL ENFORCEMENT OF THE ACT

The Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States in involved. 28 U.S.C.§ 516. Pursuant to this provision, the Attorney General has jurisdiction to prosecute criminal violations of the FECA, as well as criminal violations of the provisions of the Fund Act and the Matching Payment Act. Criminal sanctions for violations of the Act vary according to the offense and the amount of money involved in the

violation, and include fines and imprisonment. 2 U.S.C. § 437g(d). A five-year statute of limitations applies to criminal violations of the Act. 2 U.S.C. § 455.

For 30 years, the Commission and the Department of Justice have construed the Act to permit the Attorney General to pursue criminal violations of the Act and the presidential public funding statutes, either when the Department uncovers a criminal violation on its own or when the Commission refers a matter pursuant to 2 U.S.C. § 437g(a)(5)(C). In 1977, one year after the Act was amended to give the Commission exclusive *civil* enforcement authority, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") in which the agencies jointly outlined their respective roles in pursuing election law violations. 43 Fed. Reg. 5441 (1978) (JA 170). That joint memorandum not only describes the circumstances under which the Commission is to refer apparent criminal violations of the Act to the Attorney General, but also specifically addresses criminal violations of the FECA that come to the attention of the Department of Justice independently of the Commission. In such instances, the MOU provides that DOJ will "apprise the Commission of such information at the earliest opportunity" and "continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions." *Id.* While DOJ is to "endeavor" to share information with the Commission subject to existing law, the MOU specifically provides that "information obtained during the

course of [a] grand jury proceeding[] will not be disclosed to the Commission." *Id.*

In the years since the MOU issued, the Department of Justice has prosecuted numerous such criminal cases without any referral from the Commission. Among these are *United States v. Kanchanalak,* 192 F.3d 1037 (D.C. Cir. 1999); *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997); *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990); *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990); *United States v. Hsia,* 87 F. Supp. 2d 10 (D.D.C. 2000); *United States v. Mariani*, 7 F. Supp. 2d 556 (M.D. Pa. 1998); *United States v. Crop Growers Corp*. 954 F.Supp. 335 (D.D.C. 1997).

When Congress first created the Commission in the 1974 Amendments to the Act, it did not give the Commission exclusive jurisdiction over civil enforcement of the Act, but instead "*primary* jurisdiction with respect to the civil enforcement" of the Act. FECA Amendments of 1974, Pub. L. No. 93-443 § 309(b) (emphasis added) (JA 81). At that time, the contribution and expenditure limitations were contained in Title 18, and the Commission had no authority whatever to file civil actions in federal district court regarding those provisions. The Commission could refer to the Department of Justice civil violations of the Title 18 provisions over which the Commission had jurisdiction, but after referral all civil and criminal court actions were at the Attorney General's discretion. 2

U.S.C. § 437g(a)(7) (1974) (JA 168). *See also Buckley v. Valeo*, 519 F.2d 821, 893 n.191 (D.C. Cir. 1975) (concluding that the Attorney General had discretion whether to file civil enforcement proceedings referred by the Commission), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). In 1976, when Congress amended the Act in response to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), it recodified the Act, transferred to Title 2 the contribution limitations and prohibitions previously codified in Title 18, and gave the Commission, rather than the Attorney General, the power to file civil actions to enforce those provisions. 2 U.S.C. § 437g(a)(5)(B) (1976) (JA 103).

C. DISTRICT COURT PROCEEDINGS

On February 14, 2007, Barry Bialek, a Colorado physician, filed a judicial complaint naming Attorney General Gonzales and the Federal Election Commission Chairman as defendants in their official capacities. Bialek alleged in the complaint that he was one of the targets of an ongoing grand jury investigation that centered on a Michigan law firm for which he had worked as a consultant. The complaint alleged that the firm, Fieger, Fieger, Kenney & Johnson, P.C. ("Fieger firm") was being investigated over alleged illegal contributions made during the 2004 Presidential election campaign. Bialek alleged that the defendant Attorney General had issued a subpoena to compel his testimony and the production of documents before a grand jury. JA 9. Bialek claimed that because

the FECA delegates to the Commission the exclusive authority to conduct an investigation in the first instance, the Attorney General and DOJ were therefore precluded from instituting a criminal investigation into the same alleged campaign finance violations until the Commission had completed an investigation and voted to refer the matter to DOJ. JA 9. Plaintiff sought declaratory relief against the Commission and DOJ. JA 11.

Following briefing by the parties and oral argument, the district court granted the defendants' motions to dismiss and dismissed Bialek's complaint for failing to state a claim. JA 267-77 (*Bialek v. Gonzales*, Civil No. 07-0321, 2007 WL 1879989 (D. Colo. June 28, 2007) (unpublished)).[5] The court found that "there is no language in the Act that evidences a 'clear and unambiguous' intent of Congress to restrict the Attorney General's authority." JA 272. The court also found that the "provision that grants the FEC 'exclusive' jurisdiction . . . specifically refers only to *civil* enforcement," and that because the statute clearly distinguishes between civil and criminal enforcement, there is no evidence of congressional intent to restrict the authority of the Attorney General to act

[5] Although Bialek had contemporaneously moved for a declaratory judgment, *see* JA 12-14, the court did not explicitly rule on that motion in its order, *see* JA 277.

independently of the FEC in the Attorney General's enforcement of the *criminal* provisions of the Act. JA 272.

D. RELATED PROCEEDINGS

This case is the second in a series of four related cases brought by various individuals and the Fieger law firm who claim to be targets of the same ongoing grand jury investigation into illegal campaign contributions. The Fieger law firm represents the plaintiffs in all four cases, which were filed in different federal district courts within weeks of each other and raise the same legal issue based on the same underlying factual allegations. The plaintiffs all allege that they are the targets of an ongoing grand jury investigation and that the Commission is tacitly cooperating and conspiring with the Attorney General to circumvent the jurisdictional requirements of the FECA. Each case hinges on the legal issue presented in this case: whether DOJ is precluded from prosecuting violations of the FECA unless and until it receives a referral from the FEC. Recently, as discussed below, a grand jury has handed up indictments related to the investigation these plaintiffs are attempting to challenge collaterally in these four civil cases.

1. *Fieger v. Gonzales*, Civ. No. 07-10533 (E.D. Mich.)

On February 5, 2007, attorney Geoffrey Fieger, the Fieger firm, and Nancy Fisher, the Fieger firm's office manager, filed a judicial complaint against the

Attorney General and the Commission's Chairman. The district court in Michigan ruled on the identical issue that is before this Court and rejected the argument that a Commission referral is a prerequisite to DOJ's criminal enforcement of the FECA. *Fieger v. Gonzales*, Civil No. 07-10533, 2007 WL 2351006, at *3-7 (E.D. Mich. Aug. 15, 2007) (unpublished).

2. *Beam v. Gonzales*, Civ. No. 07-1227 (N.D. Ill.)

On March 2, 2007, attorney Jack Beam and his spouse, Renee Beam, filed a complaint against the Attorney General and the Commission's Chairman. These plaintiffs alleged that they were the targets of an ongoing grand jury investigation centered on the Fieger law firm with which Mr. Beam is affiliated. After briefing by the parties, the court issued a Minute Order on June 22, 2007, granting defendants' motions to dismiss without prejudice, staying discovery, and giving plaintiffs leave to file an amended complaint. A motion to dismiss the amended complaint is now pending.

3. *Marcus v. Gonzales*, Civ. No. 07-398 (D. Ariz.)

On February 21, 2007, plaintiff Jon Marcus filed a complaint against the Commission's Chairman and the Attorney General. Marcus also alleged that he is a target of the ongoing grand jury investigation involving illegal contributions. The Commission's and DOJ's motions to dismiss are fully briefed and pending before the court.

4. *United States v. Fieger, et al.,* Criminal No. 07-20414 (E.D. Mich.)

On August 22, 2007, a grand jury in the Eastern District of Michigan handed up a ten-count indictment against Geoffrey Fieger and Vernon Johnson, both shareholders in the Fieger firm. Indictment, *United States v. Fieger, et al.*, Criminal No. 07-20414 (E.D. Mich.) (available through PACER at https://ecf.mied.uscourts.gov/cgi-bin/ShowIndex.pl). The activity covered within the indictment included: conspiracy to violate the FECA (18 U.S.C. § 371) by making prohibited corporate contributions; making prohibited corporate contributions (2 U.S.C. § 441b); causing false statements (18 U.S.C. § 1001); and obstruction of justice (18 U.S.C. § 1503).

SUMMARY OF ARGUMENT

Bialek's claim is premised upon a fundamental misunderstanding of the Act, which contains no requirement that DOJ await a referral from the Commission before beginning its own criminal investigations. It is well settled that the Attorney General has plenary authority over criminal matters that is not diminished without a "clear and unambiguous" directive from Congress. The district court correctly found that the there is no language in the FECA that evidences a "clear and unambiguous" directive from Congress to restrict the Attorney General's authority. Appellant's reliance on the statutory provision

(2 U.S.C. § 437g(a)(5)(C)) that affirmatively authorizes the Commission to refer a case to the Attorney General is entirely misplaced. That provision only addresses the Commission's authority and does not restrict the prosecution of criminal matters by the Attorney General.

Numerous courts have examined the question and held that FECA's referral provision does not restrict the Attorney General's authority. The legislative history also strongly supports this conclusion. The committee report that accompanied the legislative provision at issue explicitly stated an intent not to limit the traditional criminal authority of the Attorney General. Moreover, because Bialek's Complaint contains no factual allegations concerning actions taken by the Commission or its Chairman, Bialek has failed to state a claim against the Commission.

Ultimately, Bialek's complaint represents nothing more than a misguided attempt to collaterally attack an ongoing criminal investigation. The district court correctly found "that neither the plain language of the statute nor the legislative history supports a conclusion that Congress intended to limit the Attorney General's authority to prosecute criminal violations" of the FECA. JA 277.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Alvarado v. KOB-TV*, 493 F.3d 1210, 1215 (10th Cir. 2007).

II. THE ATTORNEY GENERAL HAS AUTHORITY TO INITIATE CRIMINAL INVESTIGATIONS UNDER THE FECA WITHOUT A REFERRAL FROM THE FEC

A. NO STATUTORY LANGUAGE RESTRICTS THE ATTORNEY GENERAL'S CRIMINAL AUTHORITY TO ENFORCE THE FECA

Bialek's case is premised entirely on the erroneous argument that the Act precludes the grand jury and the Department of Justice from investigating possible criminal violations of federal campaign finance law unless and until the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred and refers the matter to the Attorney General pursuant to 2 U.S.C. § 437g(a)(5)(C). The district court correctly found "that there is no language in the Act that evidences a 'clear and unambiguous' intent of Congress to restrict the Attorney General's authority." JA 272; *see also Fieger*, 2007 WL 2351006, at *4-5. On this basis the district court properly granted the Commission's and DOJ's motions to dismiss.

"As in all statutory construction cases, [the courts] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). Here, 28 U.S.C. § 516 unambiguously provides the Attorney General plenary authority over criminal litigation: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." "Congress has given very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government." *United States v. California*, 332 U.S. 19, 27 (1947). While Congress may restrict the Attorney General's statutory authority to control litigation, it has long been settled that this authority is not diminished without a "clear and unambiguous" directive from Congress. *United States v. Morgan*, 222 U.S. 274, 282 (1911); *Executive Business Media, Inc. v. United States Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993); *United States v. Walcott*, 972 F.2d 323, 326 (11th Cir. 1992); *United States v. Hercules Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); *accord United States v. Libby*,

429 F. Supp. 2d 27, 32 (D.D.C. 2006).[6]

No language in the FECA clearly and unambiguously limits the Attorney General's authority to investigate or charge a criminal violation of federal election law unless and until he has received a referral from the Commission. To the contrary, the plain language of the referral provision on which Bialek relies, 2 U.S.C. § 437g(a)(5)(C), contains no limits whatsoever on the Attorney General's authority. The provision only addresses the *Commission's* authority; nothing in it (or in any other provision of the Act) even addresses, much less purports to restrict, the usual plenary authority of the Department of Justice and the grand jury to investigate activities that might be criminal:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such

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[6] Bialek attempts (Br. 12 n.2) to distinguish *Morgan*, but that case and its progeny stand for the proposition that there is a presumption against interpreting federal laws to limit the powers of the Attorney General to prosecute criminal violations in the absence of clear statutory language, not that a statute must affirmatively state that the Attorney General's overall plenary powers are preserved in order for his power not to be limited: "For the statute contains no expression dictating an intention to withdraw offenses under this act from the general powers of the grand jury. . . ." *Morgan*, 222 U.S. at 281. *See also United States v. International Union of Operating Eng'rs, Local 701*, 638 F.2d 1161, 1163 (9th Cir. 1979). Indeed, *Morgan* rejected the argument that an administrative notice was a prerequisite to a criminal prosecution, just as an FEC referral is not a prerequisite to a criminal prosecution brought by the Attorney General under the FECA.

> apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

In other words, this provision simply authorizes the Commission, after a finding of probable cause, to refer a case to the Attorney General if the violation is knowing and willful. That referral authority is purely discretionary, and it does nothing to limit the Attorney General's authority. *See Bialek*, JA 272; *Fieger*, 2007 WL 2351006, at *5.

Moreover, as explained *supra* pp. 2-9, both the Commission and the Department of Justice have long interpreted the Act to permit the Attorney General to investigate and prosecute criminal violations of the Act without a referral from the Commission. The Commission and the Department of Justice are both charged with enforcing the Act, and the Commission has the explicit statutory authority to interpret, and make policy respecting, its provisions, 2 U.S.C. § 437c(b)(1). When two agencies agree on the meaning of the statutory division of authority between them, deference should be afforded. *See AFL-CIO, Local 3306 v. FLRA*, 2 F.3d 6, 10 (2d Cir. 1993); *CF Industries, Inc. v. FERC*, 925 F.2d 476, 478 (D.C. Cir. 1991). "[T]he Commission is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). *See also FEC v. National Rifle Ass'n of America*, 254 F.3d 173, 185 (D.C. Cir. 2001).

Finally, Bialek argues (Br. 7) that the plain meaning of the referral provision should be disregarded to avoid what he calls an "absurd result," but Bialek's argument ignores important FECA provisions and assumes improperly that the Commissioners would violate the law. Contrary to Bialek's suggestion (*id.)*, a single dissenting Commissioner in a five-to-one decision cannot "simply walk across the street" and single-handedly present the matter to the Attorney General. A lawful referral requires an affirmative vote of at least four members of the Commission, and no more than three Commissioners may be affiliated with the same political party. *See* 2 U.S.C. §§ 437g(a)(5)(C), 437c(a)(1). Bialek's argument assumes that dissenting Commissioners would circumvent the four-vote requirement for referrals, but the Court should presume that the Commissioners discharge their duties in good faith. *See* pp. 36-37, *infra*.

In sum, the plain language of the controlling statutes do not restrict the Attorney General's independent authority to enforce the FECA criminally, and the district court's decision can be affirmed on that basis alone.

B. FECA'S LEGISLATIVE HISTORY SHOWS NO CONGRESSIONAL INTENT TO LIMIT THE ATTORNEY GENERAL'S AUTHORITY

The legislative history of the Act also shows that Congress did not intend to limit the authority of the Attorney General to investigate possible criminal violations of the Act without a referral from the Commission. Committee reports

are "the authoritative source for finding the legislature's intent . . . [as they] represent the considered and collective understanding of those [in] Congress[] involved in drafting and studying the proposed legislation." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1033 (10th Cir. 2003) (brackets and quotation marks omitted). The 1976 committee report that accompanied the House bill when the Commission was given exclusive civil enforcement authority explicitly stated an intent *not* to limit the traditional criminal authority of the Attorney General.

> H.R. 12406, following the pattern set in the 1974 Amendments, channels to the Federal Election Commission complaints alleging on any theory, that a person is entitled to relief, because of conduct regulated by this Act, *other than complaints directed to the Attorney General* and seeking the institution of a criminal proceeding.

H.R. Rep. No. 94-917 at 4 (1976), 94th Cong., 2d Sess., *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Legislative History*") at 804 (emphasis added) (JA 95). Senator Cannon, Chairman of the Senate Rules and Administration Committee and sponsor of S. 3065, gave a similar explanation of the bill:

> Under existing law, every violation of the Federal election campaign laws is a criminal act and the Federal Election Commission has extremely limited civil enforcement powers at the present time. S. 3065 would provide criminal penalties for willful and knowing violations of the law of a substantive nature, and civil penalties and immediate disclosure of violations for less substantial infractions of the campaign finance laws. At the same time S. 3065 would give the

> Commission expanded *civil* enforcement powers including the power to ask the court for imposition of civil fines for such violations as, for example, the negligent failure to file a particular report, as well as more substantial civil fines for willful and knowing violations of the act. The bill would grant the exclusive civil enforcement of the act to the Commission to avoid confusion and overlapping with the Department of Justice, *but at the same time, retain the jurisdiction of the Department of Justice for the criminal prosecution of any violations of this act*.

94 Cong. Rec. S3860-61 (daily ed. March 22, 1976) (statement of Sen. Cannon); *1976 Legislative History* at 470-71 (emphases added) (JA 92-93). *See also* 94 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of House Committee Chairman Hayes) (the bill "centralize[s] the authority to deal with complaints alleging on any theory that a person is entitled to relief because of conduct regulated by this act, other than complaints directed to the Attorney General and seeking the institution of a criminal proceeding," *reprinted in 1976 Legislative History* at 1078) (JA 99). Thus, far from supporting Bialek's strained interpretation of the Act, the legislative history of the 1976 FECA Amendments reinforces the longstanding conclusion of the Commission and the Department of Justice that the Act was not intended to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act.

The only support for his view that Bialek is able to find (*see* Br. 17) in the Act's entire 33-year legislative history is a single paragraph in a 1976 floor statement by Senator Brock. However, Senator Brock was a vociferous opponent

of the bill, which he condemned as "a deceit, a sham, and a fraud on the American public." 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (Sen. Brock); *1976 Legislative History* at 1109 (JA 108). The Supreme Court has:

> often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

NLRB v. Fruit Vegetable Packers Warehouseman, 377 U.S. 58, 66 (1964) (quotation marks and citations omitted); *Bryan v. United States*, 524 U.S. 184, 196 (1998) ("the fears and doubts of the opposition are no authoritative guide to the construction of legislation" (brackets and internal quotation marks omitted)). Accordingly, the district court correctly found "that a single statement from an opponent of the Act is not indicative of Congressional intent to limit the prosecutorial authority of the Attorney General." *Bialek*, JA 276; *see also Fieger*, 2007 WL 2351006, at *6 (discounting the Brock floor statement).[7]

[7] Bialek also argues (Br. 25-26) that there was substantive significance when certain criminal provisions were moved from Title 18 to Title 2 in 1976. This inference is entirely misplaced. The mere "rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the [relevant] provision." *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1978). Bialek conclusorily asserts that this move had significant effect, without any support in the statutory language or legislative history.

C. NUMEROUS FEDERAL COURTS HAVE FOUND THAT FECA'S REFERRAL PROVISION DOES NOT RESTRICT THE ATTORNEY GENERAL'S AUTHORITY

Seven federal courts have addressed the argument that Bialek makes here and rejected it. As the Ninth Circuit explained:

> [N]either the language nor the legislative history of the Act provides the kind of "clear and unambiguous expression of legislative will" necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act. On the contrary, the language and legislative history indicates that while centralizing and strengthening the authority of the FEC to enforce the Act administratively and by civil proceedings, Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated offenses.

United States v. International Operating Eng'rs, Local 701, ("*Operating Engineers*"), 638 F.2d 1161, 1168 (9th Cir. 1979). Similarly, the district court in the related *Fieger v. Gonzalez* case rejected the argument that a Commission referral is a prerequisite to the Department's criminal enforcement of the FECA. *Fieger*, 2007 WL 2351006, at *3-7; *see also Beam v. Gonzales*, Civ. No. 07-1227 (N.D. Ill. June 22, 2007) (minute order rejecting argument that a referral from the Commission is a prerequisite for DOJ investigation).

In *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), the court similarly concluded that "[a] finding of probable cause by the Commission and its subsequent referral to the Attorney General is not a condition precedent to

the jurisdiction of the Attorney General to investigate and prosecute alleged criminal violations." The court in *United States v. Tonry,* 433 F. Supp. 620, 623 (E.D. La. 1977), came to the same conclusion: "At no place in the statute is specific provision made prohibiting the Attorney General from going forward with criminal investigation without a referral by the Commission. In the absence of such a specific provision the general authority of the Attorney General to proceed cannot be limited." Thus, two decades ago it was already "settled that criminal enforcement of FECA provisions may originate either with the FEC, *see* 2 U.S.C. § 437g(a)(5)(C) (1982), or the Department of Justice." *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1368, n.6 (D.C. Cir. 1988). *See also United States v. Hsia*, 24 F. Supp. 2d 33, 43 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). Bialek does not cite any cases that have ever questioned this settled law.

D. THE 1979 FECA AMENDMENTS DID NOT OVERTURN PRIOR CASES INTERPRETING THE REFERRAL PROVISION

Bialek's argument that the 1979 Amendments to the FECA overturned the *Operating Engineers* decision is belied by the legislative history and has been rejected in subsequent cases.[8]

[8] The 1979 Amendments to the FECA were signed by the President and became effective on January 8, 1980. However, those amendments passed Congress in 1979 and are commonly referred to as the 1979 Amendments. *See,*

Specifically, Bialek erroneously argues (Br. 18-19) that *Operating Engineers* is no longer good law because Congress in the 1979 Amendments — purportedly in response to the Ninth Circuit's decision in that case — added the phrase "by an affirmative vote of 4 of its members" to the referral provision found at 2 U.S.C. § 437g(a)(5)(C).[9] Bialek, however, cites no discussion whatsoever of *Operating Engineers* in the legislative history. Indeed, the legislative history

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e.g., FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) (excerpts) (JA 110-65).

[9] Section 313(a)(5)(D) of the 1976 Amendments provided that:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 329, or a knowing or willful violation of a provision of chapter 95 or 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in subparagraph (A) [the thirty day conciliation period].

90 Stat. 484 (1976) (JA 103). The 1979 Amendments altered that provision to state:

> If the Commission *by an affirmative vote of 4 of its members* determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing or willful violation of a provision of chapter 95 or 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in subparagraph (4)(A) [the thirty day conciliation period].

93 Stat. 1339, 1360 (1980) (emphasis added) (JA 156).

contains no mention of the case or any evidence, direct or indirect, that Congress was even aware of the decision when it adopted the 1979 Amendments.

As the court in the recent *Fieger* decision explained when presented with the same argument Bialek makes here, the timing of the *Operating Engineers* decision makes Bialek's interpretation chronologically impossible: "In fact, the 4-vote requirement was contained in the bill reported by the House Committee on Administration on September 7, 1979, which was three weeks *before* the Ninth Circuit decided *Operating Engineers*. . . . Therefore the 4-vote requirement could not have been written in response to the *Operating Engineers* decision." *Fieger*, 2007 WL 2351006, at *7 (citing H.R. 5010 96th Cong. (1st Sess. 1979), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1979* ("*1979 Legislative History*") (dated September 7, 1979)) (emphasis added). *See also Galliano*, 836 F.2d at 1368 (decided eight years after *Operating Engineers*). Bialek never addresses the fact that the timing of the decision precludes his claim about congressional intent.

In any event, the 4-vote requirement added in the 1979 Amendments states a limitation only on the Commission's authority, not the Attorney General's. Under the 1976 Amendments, a vote of at least four of the six Commissioners was already required for the Commission to initiate investigations and civil actions. At that time, referrals to the Department of Justice, like almost all other enforcement

actions, had to "be made by a majority vote of the members of the Commission." 2 U.S.C. § 437c(c) (1976) (JA 179). Thus, in most circumstances, a "majority vote" of six Commissioners to refer a case to the Department of Justice already required four or more Commissioners, even prior to the 1979 Amendments. The 1979 Amendments recodified section 437g which, as described *supra* pp. 2-7, governs the Commission's administrative enforcement procedures, and the 4-vote requirement was added to a number of provisions at that time. *See* amended Sections 309(a)(2); 309(a)(4)(A)(i); 309(a)(6)(A) (JA 155-56), codified as 2 U.S.C. §§ 437g(a)(2), (a)(4)(A)(i), (a)(6)(A).

The effect of the 4-vote requirement was only to ensure that no fewer votes would be required even if one Commission seat were vacant or a Commissioner recused. The House Committee report plainly indicates that Congress did not intend this minor procedural change to alter the substance of section 437g(a)(5)(C), since it explained that the bill merely "incorporates the language in section 305(5)(D) of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96-422, at 22 (1979) (Section-by-Section Explanation of the Bill), *1979 Legislative History* at 206 (JA 190); *see supra* pp. 20-23. Accordingly, even if the new language had been drafted after the *Operating Engineers* decision, Congress clearly did not intend it to overrule that

decision or to alter fundamentally the Attorney General's existing authority over criminal enforcement of the Act.

E. OTHER PROVISIONS OF THE FECA ARE CONSISTENT WITH THE ATTORNEY GENERAL'S PLENARY POWER TO INITIATE CRIMINAL PROSECUTIONS

Bialek attempts to draw inferences about congressional intent from various other provisions of the Act, but none of these provisions contains any language addressing, much less purporting to limit, the usual authority of the Department of Justice and the grand jury to investigate activity that might be a criminal violation of law.

First, Bialek relies (Br. 24-25, 30-31) on 2 U.S.C. § 437g(d), which simply permits a defendant in a criminal proceeding to introduce as evidence a conciliation agreement, if one exists, entered into with the Commission that "deals with" the alleged criminal acts. Without any legal support, Bialek interprets this provision to mean that administrative respondents are *entitled* to an opportunity to negotiate with the Commission for the Commission's agreement in a conciliation agreement before any criminal investigation can begin. As explained *supra* pp. 18-19, however, the plain language of section 437g(a)(5)(C) flatly states that the Commission can refer a matter to the Attorney General "without regard to any limitations set forth" in section 437g(a)(4)(A) — *i.e.*, the provision concerning conciliation after a probable cause determination. Thus, the statute creates no

right to conciliation before a criminal investigation begins, even if that investigation results from a Commission referral. Bialek's interpretation of section 437g(d) is therefore foreclosed by other provisions of the Act.

Second, Bialek suggests (Br. 21) that the Commission's jurisdiction could be eroded when he speculates that the Commission might issue an advisory opinion "diametrically opposed" to an ongoing criminal prosecution, even though he does not identify a single instance of this happening in the Commission's 32 years of existence. In fact, the Commission will issue an advisory opinion only regarding "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking," 11 C.F.R. § 112.1(b); *see generally* 2 U.S.C. § 437f(a). Thus, past activities already subject to criminal prosecution would not qualify for an advisory opinion. Furthermore, because courts must defer to the Commission's constructions of the Act that have been established in Commission administrative proceedings, there is little risk, as Bialek claims (Br. 21), that "entirely inconsistent and diametrically opposed . . . enforcement of the Act" will result if the Attorney General retains his authority to initiate criminal investigations. Indeed, the D.C. Circuit has held that "[d]eference is due [to the Commission's interpretations of the FECA] as much in a criminal context as in any other. . . ." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (citing

cases). Again, Bialek fails to provide even one example of the worst-case scenario he envisions in the decades of shared enforcement authority under the Act.

Third, Bialek argues (Br. 12-17) that an independent grand jury investigation would be contrary to Congress's decision to give the Commission "exclusive" and "primary" jurisdiction over the Act. As explained *supra* p. 20-23, however, Congress carefully limited the Commission's exclusive jurisdiction to "civil" enforcement, 2 U.S.C. § 437c(b)(1), 437d(e). *See also* 2 U.S.C. § 437d(a)(6) (describing the Commission's power to initiate, defend and appeal "civil actions") and § 437g(a)(6) (providing that the Commission may file a "civil action" to enforce the Act). In fact, the modifier "primary" on which appellant relies (Br. 34-36) in claiming that the Commission has "primary exclusive jurisdiction" over violations of the Act was removed from § 437c(b) in 1979. Federal Election Campaign Act Amendments of 1979, section 306(b)(1), 93 Stat. 1355, amending 2 U.S.C. § 437(c)(b)(1) (1980) (JA 151).

Bialek carefully avoids any discussion of the explicit statutory language regarding the Commission's exclusive *civil* jurisdiction. *See Fieger*, 2007 WL 2351006, at *4 (criticizing plaintiffs for "consistently ignor[ing] that the Act states that the Commission has exclusive jurisdiction over 'civil enforcement,' always dropping the word 'civil' in presenting their arguments"). Since the Attorney General's plenary power to initiate criminal prosecutions of the Act is consistent

with the Commission's exclusive civil jurisdiction over that same statute, there is no merit to Bialek's claim that the Commission's authority impliedly limits the Attorney General's powers.

> The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.

SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) (citation omitted); *accord Fieger*, 2007 WL 2351006, at *7.

Bialek also argues (Br. 27-28) that the Commission's "exclusive" jurisdiction would be "thwarted" if concurrent criminal investigations could proceed because no respondent would "rationally" cooperate with a Commission civil investigation while facing criminal charges for the same conduct, but would instead invariably invoke the Fifth Amendment. Bialek hyperbolically claims that the "FEC could never, *ever* carry out its congressionally mandated functions and duties" and that "the FEC would be powerless to proceed" if an individual feared prosecution during an ongoing civil investigation by the Commission. *Id.* As a matter of fact, however, the Commission has successfully investigated thousands of cases during the 30 years that the Department of Justice has been exercising concurrent criminal authority in accord with the MOU and the *Operating*

Engineers decision.[10] Moreover, Bialek offers no reason to believe that a respondent's invocation of the Fifth Amendment would be any less likely merely because a prospective criminal prosecution would be delayed until after a referral by the FEC. An administrative respondent would have the same incentive to invoke the Fifth Amendment regardless of the order of civil and criminal investigations. In any event, there are many sources of information in an investigation beyond the administrative respondents themselves.

All told, Bialek does not present a shred of evidence to support his speculative and exaggerated claim (Br. 29) that "the FEC could never civilly resolve a dispute if the Attorney General could independently prosecute without a referral by a majority vote of the Commission." To the contrary, the Commission's successful enforcement record speaks for itself, and there is no evidence that the Attorney General's concurrent criminal authority has hampered the Commission's civil enforcement efforts.

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[10] The Commission can draw an adverse inference from a respondent's invocation of the Fifth Amendment in determining whether there has been a civil violation of the Act. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998); *McKinney v. Galvin*, 701 F.2d 584, 589 n.10 (6th Cir. 1983); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986).

III. BIALEK HAS FAILED TO STATE A CLAIM AGAINST THE COMMISSION BECAUSE HE HAS NOT ALLEGED ANY SPECIFIC FACTS REGARDING THE COMMISSION'S CONDUCT

The district court's dismissal of Bialek's complaint against the *Commission* should be affirmed for an additional reason: the complaint fails to allege sufficient facts to state a claim against the Commission or its Chairman. While all "well-pleaded" factual allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party, mere "conclusory allegations" in a complaint do not constitute well-pleaded factual allegations. *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006). Because Bialek's complaint fails to include allegations about the Commission's (or its Chairman's) conduct that state a valid claim, his complaint was properly dismissed.[11]

The Supreme Court recently clarified the requirements for pleading facts sufficient to survive a motion to dismiss. A claimant must provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order

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[11] Although the district court did not base its decision in the Commission's favor on Bialek's failure to plead sufficient facts to state a claim against the Commission or its Chairman, the Commission on appeal can defend its victory below on this alternative ground. *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1563 n.3 (10th Cir. 1991) ("defendants may raise any ground for upholding a favorable judgment they receive below"); *McDonald v. North Am. Specialty Ins. Co.*, 224 Fed. Appx. 761, 766 (10th Cir. 2007) (same).

to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (citations and ellipsis omitted). The Court emphasized that a complaint must contain a "statement of circumstances, occurrences, and events in support of the claim presented" and not mere conclusory statements. *Id.*, 127 S. Ct. at 1965 n.3 (citing 5 Wright & Miller, *Federal Practice and Procedure* § 1202, at 94-95 (2004)). "Factual allegations must be enough to raise a right to relief above the speculative level ...." *Id.* at 165 (citing 5 Wright & Miller § 1216, at 235-236). The Court stated that it sought to dispel the misconception that the federal rules did not require complaints to plead facts, noting that although a claimant need not set out in detail the facts underlying his claim, Fed. R. Civ. P. 8(a)(2) "still requires a 'showing' … of entitlement to relief." *Id.* at 165 n.3.

In this case Bialek collaterally attacks a Department of Justice grand jury investigation in which he received a subpoena, but does not allege any facts that establish any contact, interaction, or relationship between him and the Commission. JA 7-14. He does not allege that he is the subject of any complaint filed with the Commission, or that he is a participant in any investigation the Commission is conducting into alleged violations of the Act. Bialek does not allege that he has been subpoenaed by the Commission, questioned by the

Commission, or even contacted by the agency. He does not allege that he is under any threat of being investigated, subpoenaed, or subjected to any penalty.

Bialek's only allegation with respect to the FEC is that it "is tacitly cooperating and conspiring" with the Department of Justice. JA 10. This allegation is woefully inadequate for Rule 12(b)(6) purposes because it is nothing more than a conclusory assertion. Civil enforcement of the Act is part of the Commission's statutory mission, and the Commission is entitled to the normal presumption that it seeks to perform that function in good faith. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy."). In the absence of clear and specific allegations to the contrary, the courts should "'presume that [government prosecutors] have properly discharged their official duties.'" *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

Bialek's conclusory allegation of "tacit cooperation" with the Attorney General's grand jury proceeding is unsupported by the required specific factual allegations. *See, e.g.*, *Spannaus v. FEC*, 641 F. Supp. 1520, 1534-36 (S.D.N.Y. 1986) (finding plaintiffs have failed to meet their burden and are not entitled to discovery based on "allegations of bad faith and improper purpose [which] must be buttressed with specific facts"). By failing to allege any specific facts about

anything the Commission might have done to cooperate or conspire with the Department of Justice, or any action the Commission has ever taken regarding Bialek, the complaint failed to state a claim against the Commission, even if there were some legal support for his claim against the Attorney General. This failure provides an additional basis for affirming the district's court dismissal of Bialek's complaint against the Commission.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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September 28, 2007

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BARRY BIALEK, Plaintiff-Appellant, v. UNITED STATES ACTING ATTORNEY GENERAL PETER D. KEISLER, ET AL. Defendants-Appellees.	No. 07-1284 CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing principal brief complies with the length requirements of Fed. R. App. P. 32(a)(7)(B). I have relied on the word count feature of Microsoft Word 2000, the Commission's word-processing system, and have determined that the foregoing brief contains 7,682 words.

I further certify that this brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman using Microsoft Word 2000.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BARRY BIALEK, Plaintiff-Appellant, v. UNITED STATES ACTING ATTORNEY GENERAL PETER D. KEISLER, ET AL. Defendants-Appellees.	No. 07-1284 CERTIFICATE OF DIGITAL SUBMISSION

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order filed on August 10, 2007, I hereby certify that:

1. Within the foregoing brief, no privacy redactions were necessary and every document submitted is an exact copy of the written document filed with the Clerk.

2. These digital submissions have been scanned for viruses with McAfee Virus Scan Enterprise 8.0 (last updated on September 27, 2007), which indicates that the submissions are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, I caused to be served by electronic mail a copy of the foregoing Brief of the Federal Election Commission Chairman in His Official Capacity, upon the following counsel at the e-mail addresses listed below:

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